

STATE OF NEVADA  
DEPARTMENT OF EDUCATION

In the Matter of

STUDENT<sup>1</sup>, by and through her  
Parents

DECISION OF THE STATE  
HEARING OFFICER

Petitioners

vs.

School District,

September 21, 2009  
Reno, Nevada

Respondent

\_\_\_\_\_/

Representatives:

Parents, representing Student

Special Education Area Administrator

Paul Anderson, Esq.

Representing School District

State Hearing Officer

Steven P. Brazelton, Esq.

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<sup>1</sup> Personally identifiable information is attached as Exhibit A to this Decision and must be removed prior to public dissemination. *See Letter to Shad* (FPCA 12/23/04).

## **I. PROCEDURAL BACKGROUND**

This action arises under the Individuals with Disabilities in Education Act, as amended ("IDEA"), 20 U.S.C. §1400, *et seq.*, and Chapter 388 of the Nevada Revised Statutes ("NRS") and Nevada Administrative Code ("NAC"). The IDEA statutes, 20 U.S.C. §1400, *et seq.*, IDEA regulations, 34 C.F.R. 300.01, *et seq.*, and chapter 388 of the NRS and NAC are collectively referenced herein-throughout as the "IDEA".

By letter dated March 31, 2009, Student's parents (hereinafter, "Parent(s)") and/or "Petitioners"), requested an impartial due process hearing on behalf of Student [Hearing Officer Exhibit, hereinafter "H.O. Ex.", 1] under the IDEA. On the same date, Parents' request was received by the School District and forwarded to the Nevada Department of Education. H.O. 2]. On April 2, 2009, the Nevada Department of Education sent the parties a letter advising them that the undersigned Hearing Officer was appointed to serve as the Hearing Officer, and advising them of the timelines. [H.O. 4-5]

On April 9, 2009, the Hearing Officer sent the parties a letter setting forth the applicable timelines, and setting a status conference for April 10, 2009. [H.O. 8]. On April 10, 2009, the parties held their first pre-hearing status conference, as memorialized in the Hearing Officer's correspondence to the parties dated April 13, 2009. [H.O. 9]

In the Hearing Officer's April 13<sup>th</sup> correspondence, the Hearing Officer memorialized the agreement of the School District to provide Communication Access Realtime Translation ("CART") services to Student's Mother, who herself is hearing impaired, for the pre-hearing conferences, resolution sessions, and the impartial due process hearing. Subsequently, the School District agreed to provide CART Notes to Parent, pursuant to the parties' stipulation that the CART Notes also would be made available to the School District, and that the CART Notes would not be made a part of the hearing record, nor a part of Student's educational records. [H.O 9]

The pre-hearing conference, after being re-

scheduled, was held on May 4, 2009, as memorialized in the Hearing Officer's Pre-Hearing Order No. 1. [H.O. 11]. At the May 4, 2009 pre-hearing conference, the School District suggested that since the Student's 8<sup>th</sup> Grade School Year was coming to a close, and that since the proposed IEP in dispute was only intended to cover the remaining three months of Student's 8<sup>th</sup> Grade year, that Parent withdraw her hearing request and participate in an IEP meeting to discuss an IEP for Student's freshman year of high school. [H.O. 11] The Hearing Officer also expressed his opinion that some of the issues may not yet be ripe, and would be better presented in the context of an IEP proposed for Student's first year of high school. [H.O. 11]

Student's Mother requested leave to amend the Hearing Request. The Hearing Officer asked Parent to provide a proposed amended hearing request. [H.O. 11]

Parent elected to proceed in the context of the March 20, 2009 proposed IEP, and on May 7, 2009, Parents provided the Hearing Officer and School District with a proposed amended hearing request. [H.O.

12].

On May 7, 2009, a continued pre-hearing conference was held, as memorialized in the Hearing Officers' Pre-Hearing Order No. 2 [H.O. 13]. At that pre-hearing conference, Parents were granted to leave to amend their hearing request and the May 7<sup>th</sup> proposed amended hearing request was accepted as the amended hearing request. [H.O. 13]

The Parent's amended hearing request made claims not only under the IDEA but also under section 504 of the Rehabilitation Act of 1973 and American with Disabilities Act. The School District did not oppose granting Petitioners leave to amend, with the understanding that the Hearing Officer may not have jurisdiction over all claims asserted by Petitioners in the amended hearing request.[H.O. 13] The Hearing Officer identified the claims over which he has jurisdiction in Pre-Hearing Order No. 3. [H.O. 17]

With the filing of the amended hearing request, the time-lines for the resolution session and hearing were re-started with the filing of the amended hearing

request as of May 7, 2009. 34 C.F.R. §300.508(d)(4).

A continued pre-hearing conference was held on June 9, 2009, as memorialized in the Hearing Officer's correspondence of June 9, 2009. [H.O. 14]. It was acknowledged that Parents had identified six issues for the hearing in their amended hearing request, and a hearing was scheduled for August 11-13, 2009. A status conference was scheduled for August 6, 2009. [H.O. 14]

Between July 16-18, 2009, the parties corresponded with each other and the Hearing Officer by e-mail. [H.O. 15]. In response, on July 24, 2009 the Hearing Officer issued Pre-Hearing Order No. 3, requesting the parties contact the Hearing Officer's staff to schedule a status conference. [H.O. 17].

On July 27, 2009, Parents faxed and e-mailed the Hearing Officer a "Parental Prior Written Notice" dated June 19, 2009, together with an e-mail from Parent requesting, in essence, that this form be excluded from evidence at the hearing. [H.O. 19-, 20] This issue was left to be addressed at the hearing. [H.O. 23]

On July 30, 2009, a status conference was held with

the parties, as memorialized in the Hearing Officer's Pre-Hearing Order No. 4. [H.O. 23]. Although not memorialized in Pre-Hearing Order No. 4, the evidentiary issues relating to the June 19, 2009 Parental Notice were addressed at the July 30<sup>th</sup> status conference, and determined by the Hearing Officer to be best dealt with at the due process hearing.

On August 6, 2009, another status conference was held with the parties, as memorialized in the Hearing Officer's Pre-Hearing Order No. 5. [H.O. 24] Pursuant to the Parents' motion, and over the objection of the School District, the Due Process Hearing was continued until September 8-10, 2009.

On September 1, 2009, the parties provided the Hearing Officer with pre-hearing briefs, witness lists and proposed exhibits. [H.O. 25-29; *see also* H.O. 16, 19]

On September 3, 2009, a status conference was convened with the parties, as memorialized in the Hearing Officer's Pre-Hearing Order No. 6. [H.O. 32]

The hearing was held over three days, September 8-

10, 2009. The following witnesses testified at the hearing.

1. Denise Phipps, Private Third Party CART provider.
2. Susan Mckinley, School District Audiologist.
3. Student's Case Manager and Deaf and Hard of Hearing ("DHH") Teacher.
4. Student.
5. Student's Mother.
6. Edina Jambor, Hearing Impaired Advocate, Executive Director of the Deaf & Hard of Hearing Advocacy Resource Center.
7. School District Assistive Technology Specialist.
8. Student's Eighth Grade Science Teacher.
9. Student's Eighth Grade Math Teacher.
10. Student's Eighth Grade English Teacher.
11. Student's 8<sup>th</sup> Grade Middle School Principal.
12. School District Special Education Area Administrator for DHH Students.

## **II. THE HEARING RECORD**

The hearing record consists of three binders, one



of the "Hearing Officer" exhibits, consisting of the correspondence, orders and pleading generated or received by the hearing officer prior to the hearing. An index of these documents was provided to the parties at the inception of the hearing, and the Hearing Officer Exhibits ("H.O. \_\_\_\_") were made available for the parties' inspection at the throughout the hearing.

One binder includes the exhibits introduced into evidence by the Parents, and consists of an Index and page numbers in the format of "P0001", *et seq.* The third binder includes the exhibits introduced into evidence by the School District, and consists of an Index and page numbers in the format of "WCSD 001", *et seq.*

The exhibits proposed by the parties were marked ahead of time for identification by index containing exhibit numbers and page numbers. At the last pre-hearing conference, the parties stipulated to the authentication of all documents, reserving the right to object to the introduction of other documents on other grounds. At the beginning of the hearing, one exhibit

proposed by the Petitioners, number 20 was withdrawn, removed from the binder, and returned to Petitioners.

At the conclusion of the hearing, the parties stipulated that all documents that had been referenced in witness testimony would be introduced into evidence, and that all other documents would remain in the record as marked for identification only. Also at the conclusion of the hearing, the parties stipulated to the introduction of all hearing officer exhibits into the record.

The Petitioner and School District documents admitted into evidence have been left in the binders and identified on the Indexes. The documents that were proposed exhibits but that were not introduced into evidence have been removed and placed at the end of each binder. A copy of the parties' Exhibit Indexes showing which exhibits have been introduced into evidence will be provided to the parties with a copy of this Decision, together with an electronic copy of the H.O. Exhibits.

The parties were provided a copy of the CART-

prepared transcripts of the hearing, and should an appeal be filed by either party, official certified court reporter-prepared transcripts will be made available to the parties.

## **II. ISSUES<sup>2</sup>**

1. Whether the 03/10/09 proposed IEP denied FAPE by failing to include CART in academic classes with high language content, frequent collaboration in peer groups, or class participation requirements?

2. Whether the 3/10/09 proposed IEP denied FAPE by failing to adequately identify and consider Student's language and communication needs, her opportunities for direct communication with peers and teachers, her academic and full range of needs, including opportunities for direct instruction in student's language and communication mode?

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<sup>2</sup> The Hearing Officer herein restates the issues, eliminating references to section 504 of the Rehabilitation Act and Americans with Disabilities Act. The Hearing Officer's jurisdiction is limited to issues arising under the IDEA. *See* 34 C.F.R. §300.507(a) (due process complaint may present issues "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child").

The Hearing Officer read these restated issues to the parties at the inception of the Hearing, and the parties stipulated that these issues were an accurate statement of the issues presented by the Petitioners for the hearing.

3. Whether the 3/10/09 proposed IEP denied FAPE by failing to properly identify and consider Student's academic and cognitive levels?

4. Whether the 03/10/09 proposed IEP denied FAPE by failing to properly assess or evaluate Student's individual language and communication needs and need for Assistive Technology devices and services?

5. Whether the 03/10/09 proposed IEP denied FAPE by failing to conduct a full annual IEP meeting which would include Student's high school programming and transition needs?

6. Whether the 03/10/09 proposed IEP denied FAPE by failing to include meaningful educational and functional goals and objectives and adequate programming or services to address Student's language and communication needs as well as to facilitate her transition to post-secondary education?

### **III. REQUESTED RELIEF**

Petitioners request the following relief in their amended due process hearing request.

(1) Provide Student with CART in all academic

classes where instruction utilizes high language content, frequent collaboration in peer groups, or class participation requirements;

(2) Eliminate requirement that Student demonstrate ability to use CART and 100% class attendance; rather, require Student to notify the CART office when she will be absent;

(3) Facilitate Student's movement from high school to college with sensitivity to Student's needs as a student with a hearing disability in academic and functional achievement; and

(4) Include meaningful educational and functional goals and objectives and adequate programming or services to address Student's language and communication needs, as well as transitional needs.

At the conclusion of the hearing, Petitioners requested that the following relief be included in the Hearing Officer's decision:

(1) That, consistent with NAC 388.284(2), a thorough assessment be made of Student, particularly her academic, development and functional needs, her

opportunities for direct communications with peers and teachers, her academic level and full range of needs, opportunities for instruction in Student's communication mode, and the Student's need for assistive technology and services.

(2) That Student be granted the same access to the general education curriculum as her non hearing impaired peers;

(3) That an assessment be conducted of available assistive technology, including the FM System, Sound Field System, Note-Taking and CART, in relation to Student's unique hearing loss needs by a qualified person in Student's customary environment (class-room);

(4) A declaration that the FM and Sound Field Systems assist only in amplification but not comprehension for Student;

(5) That CART be provided in Student's classes, as requested;

(6) That Students' teachers be trained in the use of CART;

(7) That Student's IEP provide for transparent and

clear CART data collection to assess Student's use of CART;

(8) That Student's transitional services include programs, such as vocational rehabilitation and advocacy, as well as identification of particular universities and programs where Student will be able to obtain support services while attending college; and

(9) For a declaration that Student's good grades are not an accurate indication of whether Student is receiving meaningful educational benefit.

#### **IV. BACKGROUND FACTS**

Student was born on March 4, 1995 and is currently a high school freshman attending High School in Reno. Student was diagnosed with moderate to severe hearing loss at birth. With appropriate amplification, Student can hear to some extent. [H.O. 25]

Student has been deemed eligible for special education services as deaf or hard of hearing, and in fact has received special education and related services pursuant to an IEP since age 3 in the School District. [H.O. 26] The history of special education

and related services, including assistive technology, received by Student during her scholastic career, is summarized as follows:

(1) During elementary school and into middle school, as testified to by Student's long-time Case Manager, Student received various special education and related services, including speech therapy, specially designed instruction in the form of a special class for DHH students, note-taking, copies of overhead and power-point notes, instructional outlines, and audio amplification in various forms.

(2) Student began middle school in seventh grade at Middle School. Student's Case Manager testified that Student no longer needed speech therapy, but still needed supports in her regular education classes.

(3) Student began receiving Communication Access Real-Time ("CART")<sup>3</sup> assistive technology services as a related service for Seventh Grade science class only,

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<sup>3</sup> CART is real time transcription services provided by a certified transcriber in person or remotely over the internet. According to the School District, it currently costs \$90.00 per hour of service. H.O. 25. CART provider Denise Phipps testified that with more usage, the per hour costs could be lowered.



pursuant to her February 11, 2008 IEP. School District Exhibit 25, at page SD 86 (hereinafter, "S.D. \_\_, at \_\_].

(4) The Student's IEP was revised on March 5, 2008 to provide for CART services in both science and math. [S.D. 12, at 51].

(5) Student's three-year reevaluation was due as of February 7, 2009. [S.D. 12, at 48]

(6) A pre-evaluation planning meeting was convened on January 15, 2009 to plan Student's three year re-evaluation. [Petitioner Exhibit 8, at Page 82] (hereinafter "PT \_\_, at \_\_]

(7) Thereafter, a three year re-evaluation of Student was conducted and Student was deemed eligible for specially designed instruction and related services under the IDEA on February 2, 2009. [S.D. 47, at 171]

(8) An IEP meeting was convened on 02/27/09. [S.D. 5, at 18].

(9) A continued IEP meeting was held on March 10, 2009, and on that date, an IEP was proposed for Student by the School District and the Parents indicated their

disagreement with the proposed IEP. [S.D. 1, at 12]

(10) Although the proposed 03/10/09 IEP technically covered a full calendar year, it was the understanding of both parties that the 03/10/09 proposed IEP was intended to provide for special education and related services during the remainder of Student's Eighth grade year only. Both parties were of the understanding (notwithstanding the objection of Student's Mother, who requested just one IEP rather than two) that once Student's intended high school was identified, another IEP meeting would be convened to address Student's needs during her freshman year of high school and that the IEP would include staff from Student's intended high school. [S.D. 59]

(11) The 05/05/08 IEP is the last agreed-upon IEP and therefore the IEP that currently governs the provision of Student's special education and related services. [S.D. 12]

(12) Student is considered to have above average cognitive abilities, and she has consistently earned A's and B's on her report cards. [S.D. 28] Student has

always been placed in a regular classroom. [H.O. 25]  
Student intends to pursue post-secondary education to  
earn a four year college degree. [S.D. 1, at 05]  
Student received a perfect score on her 8<sup>th</sup> grade state-  
wide writing proficiency assessment exam. S.D. 31, at  
113.

## **V. APPLICABLE LAW**

### **A. Provision of FAPE**

Students with disabilities have the right to a  
“free and appropriate public education” (“FAPE”). 20  
U.S.C. §1412(a)(1)(A). FAPE means special education and  
related services that are available to the student at  
no charge to the parent or guardian, that meet the  
State educational standards, and conform to the  
Student’s IEP. 20 U.S.C. §1401(9); 34 C.F.R. §300.17;  
NAC §388.101.

“Special education” means “instruction designed to  
meet the unique needs of a pupil . . . in a classroom .  
. or other setting . . . includes . . . speech and  
language services, travel training and vocational  
education if these services are specifically designed

for instruction of the particular pupil to meet the needs of the pupil." NAC 388.115; 34 C.F.R. 300.39. "Related services" are defined, in relevant part, to mean developmental, corrective and other supportive services as are required to assist a child to benefit from special education. 34 C.F.R. §300.34; NAC § 388.101.

In assessing whether FAPE has been provided, a two step inquiry is necessary. First, the hearing officer must examine whether the School District complied with IDEA's procedural requirements, and secondly, whether the Student's IEP is reasonably calculated to provide educational benefits. *Board of Educ. V. Rowley*, 458 U.S. 175 (1982); *N.B. & C.B. v. Hellgate Elementary Sch.Dist.*, 541 F.3d 1202, 1207 (9<sup>th</sup> Cir. 2008). To find a procedural violation, the hearing officer must determine that procedural inadequacies resulted in the loss of educational opportunity or benefits, or that they seriously infringed upon the parents' opportunity to participate in the IEP formulation process. *Id.*

Petitioners allege both procedural and substantive

violations - Petitioners allege that the School District failed to properly evaluate Student in that Student's full range of needs are not adequately identified and that the March 10, 2009 IEP was not reasonably calculated to provide Student with educational benefits in that the specially designed instruction and related services contained in the proposed March 10, 2009 IEP were inadequate to address Student's needs.

**B. Evaluation of Student**

In preparing an IEP, as well as the three year re-evaluations required by 34 C.F.R. §300.303, the School District must assess, in pertinent part:

- (1) the educational needs of the pupil; the
- (2) the student's present levels of academic achievement and related developmental needs;
- (3) whether the pupil continues to need special education and related services; and
- (4) whether any additions or modifications to the special education and related services are needed to enable the pupil to meet the measurable annual goals

set out in the individualized educational program and to participate, as appropriate, in the general education curriculum.

NAC 388.336(2).

In making these assessments, the School District is to review:

- (1) evaluations and information provided by the parents;
- (2) local and state assessments;
- (3) classroom-based assessments and observations;
- (4) observations by teachers; and
- (5) observations by related service providers.

NAC 388.336(1).

NAC 388.370(1) allows for the speech, language or other communication skills of a student to be assessed with:

- (1) standardized test of speech, language or other communication skills;
- (2) interview of pupil or any person having personal knowledge of pupil; and
- (3) observation of the pupil.

34 C.F.R. §300.304 provides guidance on evaluations. The purpose of the evaluation is not only to assess the pupil's eligibility for special education and related services under the IDEA, but to determine "the content of the child's IEP, including information relating to enabling the child to be involved in and progress in the general education curriculum . . ." 34 C.F.R. §300.304(b)(1)(ii).

The evaluation must be "sufficiency comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability . . ." 34 C.F.R. §300.304(b)(6). To ensure that the evaluation is sufficiently comprehensive, the evaluation should be "in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally . . .", be "administered by trained and knowledgeable personnel", and assess the child "in all areas related to the suspected disability, including, if appropriate . . . communicative status . . ." 34 C.F.R. §300.304(c).

**C. Development of and Contents of IEP**

The IDEA requires that an IEP be in place at the beginning of each academic year. 34 C.F.R. §300.323(a).

NAC 388.284(1) sets forth the required contents of an IEP. They include, in pertinent part:

(1) a statement of the pupil's present levels of academic achievement and functional achievement, including "a description of how the disability of the pupil affects the involvement and progress of the pupil in the general education curriculum";

(2) a statement of the student's measurable annual goals, including benchmarks or the short-term instructional objectives, and academic and functional goals relating to meeting the disability-related needs of the pupil;

(3) a statement of the specific special education and related service that must be provided to the student to (a) advance toward the annual goals, (b) participate and progress in the general education curriculum, and (c) participate with other pupils;

(4) a statement of the assistive technology devices



and services necessary for the student to receive FAPE;  
and

(5) for students 14<sup>4</sup> or older, a statement of transition services, including placement in AP courses or vocational education program.

When developing the IEP, NAC 388.284(2) requires that the IEP take the following into account, in pertinent part:

(1) the academic, developmental and functional needs of the student;

(2) the language and communication needs of the student;

(3) the student's opportunities for direct communications with peers and teachers; and

(4) the student's academic level and full range of needs;

(5) opportunities for direct instruction in the student's language and communication mode; and

(6) the student's need for assistive technology and

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<sup>4</sup> Student turned 14 years old on March 4, 2009, five days before the 03/10/09 IEP in dispute.

services.

The IEP must be tailored to the unique needs of the particular student, who by reason of her disability, needs special education and related services. *Heather v. State of Wisconsin*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996). The student's unique needs "'shall be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical and vocational needs'". *Id.* at 1501 (citations omitted).

**D. Assessing Educational Benefit of the Special Education and Related Services in the IEP**

To confer meaningful educational benefit under the IDEA, the Student's IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade". *Hood v. Encinitas School District*, 486 F.3d 1099, 1107 (9<sup>th</sup> Cir. 2007) (quoting *Rowley*). While passing marks and grade advancement are key indicators of meaningful educational benefit, they are not necessarily dispositive. *Id.* The hearing officer must also consider "whether the child makes progress toward the

goals set forth in her IEP." *County of San Diego v. Calif. Spec. Ed. Hearing Office*, 93 F.3d 1458, 1467 (9<sup>th</sup> Cir. 1996).

Although the "IDEA and case law interpreting the statute do not require potential maximizing services . . . , [the] IEP must be "reasonably calculated to develop [the child] and be responsive to his individual needs". *Adams v. State of Oregon*, 195 F.3d 1141, 1150 (9<sup>th</sup> Cir. 1999). The "'type and amount of learning' of which a student is capable" must be assessed "in order to determine how much of an educational benefit must be provided." *Deal v. Hamilton Co. Bd. of Educ.*, 392 F.3d 840, 863 (6<sup>th</sup> Cir. 2005) (citations omitted). Indeed, "[i]n evaluating whether an educational benefit is meaningful, logic dictates that the benefit 'must be gauged in relation to the child's potential.'" *Id.* at 864 (citation omitted).

While the meaningfulness of the educational benefit is gauged against the child's potential, "optimum performance" is not required by the IDEA. *Adams*, 486 F.3d at 1098. Rather, the personalized instruction and

support services provided to the student must be reasonably calculated to provide a "basic floor of opportunity" for educational benefit. *Union Sch. Dist. V. Smith*, 15 F.3d 1519, 1524 (9<sup>th</sup> Cir. 1994).

In assessing the meaningfulness of the educational benefit, the goals of the IDEA are to taken into account. One of the IDEA's stated purposes is to "ensure that [all disabled children] have the skills and knowledge necessary to enable them . . . to be prepared to lead productive, independent, adult lives, to the maximum extent possible. 20 U.S.C. § 1400(a)(5)(E)." *Deal*, 392 F.3d at 864.

#### **E. Assistive Technology for DHH Students**

One form of special education or related service is "assistive technology", which means any device or service "used to increase, maintain, or improve the functional capabilities of a child with a disability", and including evaluations of the child and the provision of training or technical assistance to the child. 34 C.F.R. §300.5-6; see also 34 C.F.R. §300.105.

Assistive technology is required to be provided if

needed to render FAPE to the child. 34 C.F.R.

§300.105(b).

In relation to deaf or hard of hearing students, related services include "[d]etermination of the range, nature, and degree of hearing loss . . . oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print and TypeWell . . . ." 34 C.F.R. 34 C.F.R. §300.34(c).

**F. Burden of Proof at Hearing**

As the party requesting the hearing, Petitioners bear the burden of proving by a preponderance of evidence the claims contained in the six issues set forth above. *Schaffer v. Weast*, 546 U.S. 49 (2005).

**G. Relief**

When a local educational agency fails to provide FAPE, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. *School Committee of the Town of Burlington v. Dept. of*

*Ed.*, 471 U.S. 359, 374 (1996).

## **VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In this proceeding, Parents allege that the School District failed to properly evaluate Student's needs for specially designed instruction and related services in preparation for Student's spring 2009 IEP, and that the proposed IEP of March 10, 2009 fails to provide the special education, related services, and supplementary aids and services required by Student's unique needs.

Because both parties agreed that the March 10, 2009 IEP was intended only to cover the remainder of Student's Eighth Grade school year, the Hearing Officer will only address whether Student was properly evaluated and whether the 03/10/09 proposed IEP denied FAPE to Student in relation to the remainder of her 8<sup>th</sup> Grade year only. In other words, whether the March 10, 2009 proposed IEP will deny FAPE to Student during her freshman year of high school or whether further evaluation of Student is needed to assess Student's needs during her freshman year of high school, has not been considered by the Hearing Officer because it is

not within the scope of the claims made by the Petitioners in their amended hearing request. Student's current IEP Team will have to assess how Student's disability affects her access to the general education curriculum during her freshman year of high school, as well as what services and supports are appropriate for Student for her freshman year of high school.

1. Whether the 03/10/09 proposed IEP denied FAPE by failing to include CART in academic classes with high language content, frequent collaboration in peer groups, or class participation requirements?

CART was required in Student's IEP for Student's other academic classes if it was needed to enable Student to advance toward the annual goals set forth in Student's IEP, participate and progress in the general education curriculum, and participate with other pupils. NAC 388.284(1). For the reasons set forth below, the Hearing Officer finds that CART was not necessary in Student's other academic classes for Student to be able to advance toward the annual goals set forth in Student's IEP, participate and progress

in the general education curriculum, and participate with other pupils in those classes. Accordingly, the Hearing Officer concludes that Student was not denied FAPE by the denial of CART to her in history class, or any of her other academic classes, for the remainder of her 8<sup>th</sup> Grade academic year.

The 03/10/09 proposed IEP provides for several Supplementary Aids and Services, including preferential seating (with left ear towards the class, never in the dark), captioned films when possible, if not notes and alternative assignment, copies of notes or overheads or PowerPoint presentations, FM and Speaker (Sound Field) systems when available, and CART in math and science. The Hearing Officer finds that these supplementary aids and services were adequate for Student's 8<sup>th</sup> Grade year, given Student's meaningful academic progress evidenced by her grades, performance on standardized tests, and class participation as testified to by her teachers.

As of the 03/10/09 proposed IEP, CART was provided for math and science. Student testified that she would liked to have had the benefit of CART services for



history in 7<sup>th</sup> and 8<sup>th</sup> Grade as well. Student's Mother testified that she requested at the February 27, 2009 IEP meeting that CART be added to Student's history class. The 02/27/09 IEP meeting was continued to 03/10/09. On that date, an IEP was proposed by the School District and rejected by Petitioners, prompting Petitioners to file the due process hearing request at issue on March 31, 2009.

Student received an "A" in history for both semesters in 8<sup>th</sup> Grade. [S.D. 28]. Student's history teacher did not testify at the hearing. However, Student's 8<sup>th</sup> Grade Science, Math and English teachers all testified at the hearing.

Each of Students' teachers testified that as of the 03/10/09 IEP meeting, based upon their observations of Student in their respective classes, none of them believed Student required the use of CART in order to access the curriculum in their class, to achieve the passing grades set forth as the goal in the Student's IEP, or to meaningfully participate in classroom discussions or to collaborate with peers. They each

also testified that Student made meaningful academic progress, and that Student was not given preferential treatment in terms of grading, but that Student genuinely earned her A's or B's in those classes. Students' teachers also testified that Student appeared to comprehend what was going on in the classrooms, that Student responded appropriately to questions, asked appropriate questions, and participated in classroom discussions.

The Hearing Officer observed the demeanor of each of Student's teachers during their testimony and assessed each of the teacher's testimony for internal consistency and for consistency with the other witness testimony during the hearing. Nothing was observed in the demeanor of the teachers which would suggest the teachers did not testify credibly, and the Hearing Officer found the teacher's testimony to be internally consistent and generally consistent with the other testimony offered throughout the hearing.

Student's Mother testified that at the 02/27/09 IEP meeting, her request for the addition of CART for

history class was met with resistance because some of the IEP team members understood that the School District administration had to approve additional CART services. The testimony at the hearing, and the e-mails in the record indicate that the School District officials were reluctant to add CART because they did not want to spend additional money on a service that they did not believe were necessary. [S.D. 42]

With respect to history in 8<sup>th</sup> Grade, Student, who is an effective lip-reader, testified that her teacher often spoke with her back to the class, and that often non-captioned movies were presented (Student testified that lip-reading is not often possible with respect to movies). However, the School District presented a copy of Student's notes from a non-captioned movie in history class. [S.D. 44] Student's notes from this movie were detailed and exhibited a meaningful comprehension of the subject matter presented in the movie. Moreover, Student received an "A" in her spring semester social history class. Student's history teacher did not testify.

Student testified that in the classroom environment, she often hears speech, but has difficulty with comprehension of speech (ie, sound discrimination). As acknowledged by Susan McKinley, the problems with any amplification system is that they amplify not only a particular speaker's voice, but all ambient noise, and they also present technical problems like static and interference. In addition to Student's hearing aide, the School District has made available to Student both FM systems and Sound Field systems.

Based upon Student's testimony at the hearing, the Hearing Officer finds that Student has excellent command of the English language, excellent speaking skills, and is capable of identifying and advocating for her own disability-related needs.

An FM System is an amplification system over an FM channel communication device, amplifying a speaker's voice through a microphone to a small receiver attached to the listener's hearing aide. The problem with FM systems is static and interference. Student testified she often gets a head-ache when she uses the FM

systems.

A Sound Field system is a microphone-to-speaker amplification system, which provides amplification for the entire class. Problems with the Sound Field systems include the amplification of ambient noise and acoustical challenges in a particular classroom.

Despite the challenges presented by the amplification devices, as evidenced by her excellent grades Student was able to receive meaningful educational benefits during the remainder of her 8<sup>th</sup> Grade academic year. As reported by her teachers, she was also able to participate meaningfully with her peers.

Further, Student's excellent command of the English language and ability to express her own concerns, as evidenced by her testimony at the hearing, enables her to advocate for her own disability-related needs, in consultation with her Case Manager and teachers, consistent with the annual goals and specially designed instruction set forth in her proposed IEP.

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2. Whether the 3/10/09 proposed IEP denied FAPE by failing to adequately identify and consider Student's language and communication needs, her opportunities for direct communication with peers and teachers, her academic and full range of needs, including opportunities for direct instruction in student's language and communication mode?

NAC 388.284(2) requires an IEP Team to consider:

- (1) the academic, developmental and functional needs of the student;
- (2) the language and communication needs of the student;
- (3) the student's opportunities for direct communications with peers and teachers; and
- (4) the student's academic level and full range of needs;
- (5) opportunities for direct instruction in the student's language and communication mode; and
- (6) the student's need for assistive technology and services.

In preparing the IEP, the IEP Team considered Student's academic level and her opportunities for direct communication with peers and teachers, by

considering her class participation, grades and standardized testing. [S.D. 1, at 2-3]. The IEP Team also considered Student's communication needs and need for assistive technology. [S.D. 1, at 2-4, 8]. The Supplementary Aids and Supports indicate that the IEP Team's consideration of Student's communication needs specifically took into account Student's lip-reading, by identifying her need for seating at the front of the class and for notes when closed captioned films were not available. [S.D. 1, at 8].

The Supplementary Aids and Supports also further considered Student's particular communication needs and need for assistive technology devices, by providing for FM and Speaker systems, and copies of notes, overheads and PowerPoint presentations. [S.D. 1, at 8] As testified to credibly by Students' teachers, the IEP Team also considered how Student was doing socially. Student's Case Manager testified credibly that Student, for reasons of social inclusion, did not want to be associated with the note-takers used by other DHH Students, and that Math and Science were two subjects

that did not come as easily to Student, so CART was provided to Student for Math and Science.

The Hearing Officer finds that the proposed IEP itself and the testimony of Student's teachers as a whole demonstrates that Student's IEP Team considered each of these factors when preparing the IEP in dispute. Accordingly, the Hearing Officer concludes that Student was not denied FAPE in this regard.

3. Whether the 3/10/09 proposed IEP denied FAPE by failing to properly identify and consider Student's academic and cognitive levels?

NAC 388.284(1) requires that the Student's IEP include a statement of the pupil's present levels of academic and functional achievement, including "a description of how the disability of the pupil affects the involvement and progress of the pupil in the general education curriculum." By including the standardized testing scores, grades, and teacher reports, the 03/10/09 IEP adequately identified and considered Student's academic and functional levels for the purposes of identifying the special education and



related services needed by Student for the remainder of her 8<sup>th</sup> Grade year.

All of the data collected by the School District indicated Student was performing at a high academic level and participating with her peers in the general education curriculum. Hence, this information was sufficiently comprehensive so as to enable Student's IEP Team to consider the supports needed to maintain Student's high academic level for the remainder of her 8<sup>th</sup> Grade academic year.

While the IEP does not include any assessment of Student's cognitive levels, it does not appear any such assessment was required at the time, given Student's excellent academic track record. In other words, a cognitive assessment was not needed in order to assess Student's special education and related service needs. 34 C.F.R. §300.304(b)(6). Had Student not been excelling in her academic classes, a cognitive assessment might have been indicated in order to identify the reasons for Student's struggles and the supports needed to assist her.

Accordingly, in terms of identifying and considering Student's academic and cognitive levels, the Hearing Officer finds that the 03/10/09 proposed IEP did not deny FAPE to Student because it was sufficiently comprehensive to enable Student's IEP Team to identify Student's special education and related service needs for the remainder of her 8<sup>th</sup> Grade academic year.

4. Whether the 03/10/09 proposed IEP denied FAPE by failing to properly assess or evaluate Student's individual language and communication needs and need for Assistive Technology devices and services?

A three year evaluation must be "sufficiently comprehensive to identify all of the child's special education and related services needs . . ." 34 C.F.R. §300.304(b)(6). The Hearing Officer finds that the evaluation of Student sufficiently identified her special education and related needs, including her individual language and communication needs, and need for assistive technology. Hence, Student was not denied FAPE in this regard.

Student's three year evaluation consisted of an audiological exam, together with an assessment of Student's grades and teacher comments. [S.D. 47; S.D. ] In soliciting teacher comments, Student's Case Manager Carrie requested feedback on the teachers' perceptions of Student's comprehension of the teacher and other students in the classroom, Student's self-advocacy for accommodations and extra assistance to ensure her comprehension, the appropriateness of present accommodations, and Student's use of and need for CART. [PT 36]. The teachers' comments are provided in the 03/10/09 proposed IEP.

By considering Student's classroom performance and obtaining feedback from Student's teachers on Student's communication needs and need for supports in the classroom, the School District's evaluation of Student was sufficiently comprehensive to identify the special education and assistive technology needed by Student for the remainder of her 8<sup>th</sup> Grade academic year. As such, the Hearing Officer finds that the School District properly assessed Student's individual

language and communication needs and need for Assistive Technology devices and services for the remainder of her 8<sup>th</sup> Grade academic year.

Further, Student made meaningful progress toward her IEP goal of achieving passing grades and received meaningful academic benefits during the remainder of her 8<sup>th</sup> Grade academic year, indicating a more in depth assessment was not necessary. In fact, Student received A's and B's on her 8<sup>th</sup> Grade report card. [S.D. 28]

For the reasons set forth *infra*, the Hearing Officer makes no finding as to whether the evaluation was sufficiently comprehensive to identify Student's special education and related services needs for her freshman year of high school.

5. Whether the 03/10/09 proposed IEP denied FAPE by failing to conduct a full annual IEP meeting which would include Student's high school programming and transition needs?

The IDEA requires that an IEP be in place at the beginning of each academic year. 34 C.F.R. §300.323(a). Petitioners argue that by providing an IEP only

intended to cover the last three months of Student's 8<sup>th</sup> Grade academic year, the School District violated an obligation to provide annual IEPs. The Hearing Officer finds that the School District did not violate its obligation in this regard given that as of 03/10/09, Petitioners had not yet notified the School District of which high school Student would be attending, as testified to by Student's Mother.

It was the School District's intent to re-convene an IEP meeting once it was determined which high school Student would be attending, in order to include Student's high school teachers in the IEP process. This intent was communicated to Petitioners via e-mail. [S.D. 58, 59] The Hearing Officer finds this approach was reasonable and in compliance with the School District's obligation to have an IEP in place at the beginning of each academic year.

NAC 388.284(e) requires that for pupils 14 years or older, such as Student, the IEP include "a statement of transition services with regarding to the pupil's courses of study, including, without limitation,

participation in advanced placement courses or a vocational educational program." (Emphasis added). When a pupil is 16, the transition services must include "measurable postsecondary goals based upon age-appropriate transition assessments relating to training, education, employment, and where appropriate, independent skills . . . [and] Transition services . . . needed to assist the pupil in reaching those goals." NAC 388.284(f).

As Student was 14 at the time of the proposed IEP on March 10, 2009, the School District was only obligated to focus on Student's "courses of study", as opposed to the broader considerations required for pupils 16 years or older. The transition services in Student's proposed IEP properly focus on the course of study she will need to take in order to pursue her goal of attending a four year university. [S.D. 1, at 5-6]. Accordingly, the Hearing Officer finds that the School District complied with its obligations under NAC 388.284(e).

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6. Whether the 03/10/09 proposed IEP denied FAPE by failing to include meaningful educational and functional goals and objectives and adequate programming or services to address Student's language and communication needs as well as to facilitate her transition to post-secondary education?

A. Meaningful Educational and Functional Goals and Objectives.

NAC 388.284(1) requires, in pertinent part, that a pupil's IEP include academic and functional goals relating to meeting the disability-related needs of the pupil. The 03/10/09 proposed IEP included as goals, the following:

(1) demonstrate ability to use CART as measured by important information taken from CART notes and being in assigned classes 100% of the time; and

(2) take initiative to implement accommodations prescribed through the IEP; and

(3) maintain passing grades in academic classes 100% of the time.

The Hearing Officer finds that these goals were appropriate in relation to the disability-related needs of Student. Student's Mother testified that she was

requesting that CART be added to an additional class for the remainder of 8<sup>th</sup> Grade, and the School District Area Administrator testified that she was concerned Student did not need CART in any of her classes. Accordingly, it was appropriate to provide Student with the goal of demonstrating her use of CART. Moreover, Student's Case Manager testified to the importance of Student becoming her own advocate and of Student's desire to be independent, so it was appropriate to provide Student with the goal of taking the initiative to implement the accommodations being made for her in the classroom. Given Student's desire to pursue post-secondary education and her demonstrated academic ability, it was also appropriate to provide Student with the goal of passing all of her academic classes.

Petitioners failed to identify any other goals they believed would have been appropriate for Student's 03/10/09 IEP, and the Hearing Officer finds that the goals set forth in the 03/10/09 IEP were appropriate and adequately addressed the disability-related needs of Student.



- B. Adequate programming or services to address Student's language and communication needs as well as to facilitate her transition to post-secondary education.

An IEP must include the specific special education and related services reasonably calculated to enable to the Student to (1) advance toward the annual IEP goals, (2) participate and progress in the general education curriculum, and (3) participate with other pupils. NAC 388.284(1). In preparing the IEP, the IEP Team must consider, in pertinent part , the Student's language and communication needs.

For the reasons set forth, the Hearing Officer concludes that the special education, related services, and supplementary aids and supports set forth in the proposed 03/10/09 IEP adequately considered Student's communication needs and were reasonably calculated to enable Student to (1) advance toward the annual IEP goals, (2) participate and progress in the general education curriculum, and (3) participate with other pupils.

The Special Education services proposed by the

03/10/09 IEP included 10 minutes per week of meeting with a special education teacher to go over Student's notes, and 5 minutes of consultation between the general education teachers and Student's Case Manager to review Student's weekly progress.

The 03/10/09 proposed IEP provides for several Supplementary Aids and Services, including preferential seating (with left ear towards the class, never in the dark), captioned films when possible, if not notes and alternative assignment, copies of notes or overheads or PowerPoint presentations, FM and Speaker (Sound Field) systems when available, and CART in math and science. The proposed Related Services in the 03/10/09 IEP included transportation, 10 minutes per month of audiology services, and CART captioning in Math and Science.

Given Student's hearing impairment, her demonstrated academic abilities, and her successful use of similar or same services and aids in the past, the Special education programming, Supplementary Aids and Services and Related Services were reasonably

calculated to enable Student to advance in a meaningful way through the general education curriculum. And in fact, Student did make meaningful progress and participate meaningfully in her academic classes for the remainder of her 8<sup>th</sup> Grade academic year. Accordingly, she was not denied FAPE in this regard.

#### **VII. ORDER**

For the reasons set forth in this Decision, the Hearing Officer finds that Student was not denied FAPE in relation to her 2009 three year evaluation or proposed 03/10/09 IEP. Accordingly, all relief requested by Petitioners is denied.

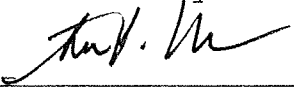
#### **VIII. NOTICE OF APPEAL RIGHTS**

Any party aggrieved by this Decision has the right to appeal within thirty (30) days of the receipt of this Decision pursuant to NAC 388.315. A party to the hearing may file a cross-appeal within ten (10) days

/ / /

after receiving notice of the initial appeal. NAC  
388.315.

Dated this 21<sup>st</sup> day of September, 2009

  
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Steven P. Brazelton,  
State Hearing Officer